FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, ET AL.,

Petitioners,

v.

MARIE MANHART, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN NURSES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICAN NURSES' ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

American Nurses' Association ("ANA") submits this brief as amicus curiae in support of the respondents.* The brief demonstrates: (i) that the selection of sex, among all factors associated with longevity, as a conclusive determinant of the benefits and costs of retirement plans, is discrimination because of sex; (ii) that Title VII of the Civil Rights Act of 1964 proscribes such discrimination; and (iii) that requiring all female employees (and females alone) to pay the costs of providing to females the same protection which male employees receive against the risk of longevity is not permitted by Title VII of the Civil Rights Act of 1964.

INTEREST OF THE AMICUS CURIAE

ANA is the nation's largest professional organization of registered nurses. It has approximately 200,000 members belonging to constituent state nurses' associations in the fifty states, the District of Columbia, the Virgin Islands and Guam. ANA's purposes are to foster higher standards of nursing practice, to promote the professional and educational advancement of nurses, and to promote the economic and general welfare of nurses to the end that all people may have better nursing care.

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* Pursuant to Supreme Court Rule 42(2), this brief is accompanied by the written consent of all the parties to this case and is being presented for filing within the time allowed for the filing of the respondents' brief.

ANA is strongly committed to the eradication of all forms of discrimination on the basis of race, sex, and other arbitrary classifications, particularly in the field of nursing care. ANA has participated frequently in judicial proceedings involving matters of concern to its membership. As a member of CAPE, the Coalition of American Public Employees, ANA has also addressed issues before this Court concerning public employees.

Many of ANA's members are affected by retirement plans which discriminate on the basis of sex in either employee contributions or benefits. A great number of ANA members are covered by plans of the Teachers Insurance And Annuity Association of America and College Retirement Equities Fund ("TIAA-CREF") at hospitals and nursing educational institutions affiliated with public and private universities and colleges. The TIAA-CREF plans, which generally provide lower monthly benefits to women, are the subject of much sex discrimination litigation, including American Nurses' Ass'n v. TIAA-CREF, No. C-75-558-G (M.D.N.C.).

For the past few years ANA has devoted considerable attention to the issues underlying the case at bar. In 1973 ANA filed nine charges of discrimination in various district offices of the Equal Employment Opportunity Commission ("EEOC") throughout

the nation. After the EEOC determined that the TIAA-CREF plan at The University of North Carolina discriminated because of sex, ANA commenced litigation to enjoin the discrimination. The ANA case is presently stayed pending disposition by this Court of the case at bar. American Nurses' Ass'n v. TIAA-CREF, supra.

What the Court does in the present case, therefore, is a matter of vital concern to ANA and its members throughout this country. ANA therefore sets forth its views on what it considers to be several important issues before the Court in this case. This brief does not treat the statutory defense based upon §703(h) of Title VII of the Civil Rights Act of 1964, any other defense raised in the case at bar and the applicability of other statutes and constitutional provisions to the conduct at issue here.

POSITION OF THE AMICUS CURIAE

This case presents a serious question of sex discrimination against women who work: Does Title VII of the Civil Rights Act of 1964[1] permit an employer to compensate its female employees less favorably than its male employees (by providing lower

[1] 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e et seq. (hereinafter "Title VII").

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periodic benefit payments to females or by requiring of females higher contributions for equal periodic benefit payments) solely by reference to mortality tables which exclude all determinants of longevity other than sex? We submit that the answer to this question is "no" under §703(a)(1) of Title VII and that the Court should take this opportunity to clarify the application of Title VII to retirement plans which limit their cost and benefit determinants to sex[2] and which require all female participants (and only females) to pay the cost of providing equivalent insurance coverage to males and females against the risk of longevity.

THE SETTING OF THESE UNLAWFUL EMPLOYMENT PRACTICES

Retirement plans providing for lifetime annuities to participants insure against the risk of longevity by deferring compensation to the retirement years. The impropriety of using longevity (or mortality) tables which exclude consideration of all factors associated with longevity other than

[2] No one disputes the propriety of using age in computing these benefits and contributions. See 29 U.S.C. §623(f)(2). We therefore sometimes refer herein to sex as being the exclusive determinant of costs and benefits of the plans at issue.

sex is highlighted by the following historical description of insurance against longevity.

1. Description of the Retirement Plans.

The "defined benefit" plan at issue in this case is but one variant of the retirement plans which discriminate against women. In the plan at bar, all employees of the defendant receive equal monthly payments of deferred benefits based upon their years of service and salary levels. The cost of providing these benefits is calculated by reference to tables of expected longevity. Because these tables exclude every determinant of longevity other than sex and because the tables (calibrated solely on sex) tend to show that women, as a class, live longer than men, as a class, actuaries have determined that it costs more to provide the defined benefits to women, as a class, than to men, as a class. Upon the basis of this actuarial "conclusion" the defendant requires women, and women alone, to fund these presumed additional costs by making women contribute from their wages approximately 15% more to the defendant's plan than their male counterparts.

The plan which is prevalent among ANA members is a variant of the "defined

contribution" plan.[3] Under this plan contributions are made at equal rates by and on behalf of all participating employees, regardless of sex. Female participants, however, receive substantially lower monthly retirement benefits solely because the benefits are calculated by reference to longevity tables limited to only one factor associated with longevity: sex.

The two foregoing plans are illustrative of the many variants of defined benefit and defined contribution plans in use today to provide deferred compensation to our nation's workforce. The common discriminatory element of all these plans is the conclusive reliance upon tables of expected longevity which are calibrated to consider only sex as a determinant of longevity, despite reliable professional judgment that where "appreciable differences" in mortality "might materialize," those differences should be factored into consideration.[4]

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[3] Brief of TIAA-CREF, p. 2. The TIAA-CREF plan covers nearly 500,000 persons in over 85% of private four year colleges and universities and 40% of all such public institutions.

[4] H. Gershenson, Measurement of Mortality, p. 153 (1961).

2. The Growth of Retirement Plans as an Element of Employee Compensation.

The history of retirement plans is instructive and accounts for the focus of the defendants and their supporting amici curiae on a narrow range of hypothetical actuarial considerations alone. Pensions originated as purely discretionary gratuities which an employer settled upon selected employees as rewards for long and loyal service to the employer.[5] These pensions were not regarded as a form of compensation, and they existed outside the ambit of the contract between master and servant. Indeed, they were an important element of discouraging collective activity and an acceptable means of encouraging older workers out of the workforce.

The predominant modern notion underlying annuities is the "deferred wage" concept, which is said to be the foundation for the TIAA-CREF plans. D. Gregg and V. Lucas, infra n. 5 at pp. 518, 608-09. This concept holds that in order to provide for the increasingly significant risk of longevity,[6] employees are willing to defer a portion of their compensation to their retirement years by purchasing annuities.

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[5] D. Gregg and V. Lucas, Life and Health Insurance Handbook, 516-17 (3d ed. 1973).

[6] Infra, n. 8 and text.

The point of this historical resume is to emphasize that funding of an employee's retirement years is no longer a gratuity which the employee hopes for from a benevolent employer; rather, retirement funding by deferring current earnings is a key element of modern employee compensation. The costs of providing equal benefits to all employees is an element of overhead which may not lawfully be borne disproportionately by females, as the defendants and the insurance industry amici curiae[7] would have it.

3. Increased Longevity and the Need for Retirement Benefits.

Several insurance industry experts have frankly admitted that the increase in longevity which this nation is presently experiencing is a "recent and dramatic development" that we do not yet fully appreciate.[8] The recent phenomenon

[7] E.g., Brief of American Council of Life Insurance, pp. 42-49.

[8] D. Gregg and V. Lucas, supra n. 5. at pp. 513-18. The increase in longevity - mainly due to decreased mortality at younger ages - is startling indeed. In 1920 the expectation of longevity at birth was 54.1 years, a full decade short of "normal retirement"; by 1940 the expectation was 62.9 years; by 1970 the

of life expectancy past normal working ages has, as noted before, translated into the growth of retirement plans as a mode of compensation. Employees no longer regard retirement benefits as a gift. It is accepted that employees are currently working not only for current wages, but also for a level of benefits necessary to fund their needs through the end of their lives. Labor unions were quick to recognize the phenomenon of increased longevity by arguing successfully for the inclusion of retirement benefit plans in the mandatory subjects of collective bargaining.[9] More recently, Congress recognized the increase in the risk of longevity by two pieces of legislation designed

[8] Cont'd
expectation had climbed to 70.9 years and in 1974, the latest reported year, the expectation was 71.9 years, approximately 7 years past "normal retirement." U.S. Fact Book (1977), Chart no. 85, p. 60 [Source: U.S. Nat. Center for Health Statistics, Vital Statistics of the United States, annual].

[9] Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir.) cert. denied 336 U.S. 960 (1949). See generally, Note, Sex Discrimination and Sex-Based Mortality Tables, 55 Bost. U.L.Rev. 624, 631, nn. 48-50 and text (1973).

to deal with longevity in employment[10] and longevity in retirement.[11] In both cases Congress specifically adverted to the problems of longevity and the financial and other risks attendant to the phenomenon of a society with a dramatically increasing older population. And in the latter case Congress specifically sought to protect the "well being and security of millions of employees and their dependents [who] are directly affected by these [employee benefit] plans" by requiring the plans, inter alia, to meet minimum vesting, funding, disclosure and termination standards. 29 U.S.C. §1001(a)-(c).

The needs of those employees who do outlive their earning age must be underscored in considering insurance against the risk of longevity. Insurance experts themselves candidly forsake the notion that retired persons can get along on

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10 Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967), 29 U.S.C. §621.

11 Employee Retirement Income Security Act of 1974, 88 Stat. 832 (1974), 29 U.S.C. §1001.

substantially reduced incomes.[12] They point out that social pressures discourage substantial changes in lifestyles; that families are soon drawn apart in our mobile society and that parents do not move to their children's homes as often as in the past; and that the fixed costs of living are generally not reduced as much as most think when one leaves the workforce. Moreover, the experts note that the modern trend in social thinking is that retired persons should not be expected to suffer a much lower standard of living as a penalty for being out of the workforce. See H. Denenberg, et al., infra, n. 12.

In business terms the high fixed costs of doing business as a human being in a complex, highly regulated urban society means that employees whose retirement funds do not meet their needs are virtually committed to a poorer and meaner existence. To accept the defendants' and the industry's arguments for exempting retirement benefits and costs from Title VII would either make the poorer group disproportionately female or burden all female employees disproportionately

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12 H. Denenberg, R. Eilers, J. Melone, R. Zelten, Risk and Insurance, pp. 283-84 (3d ed. 1974); D. Gregg and V. Lucas, supra n. 5, at p. 514.

with the additional costs of providing benefits to a small group of the longest lived employees.

4. Meeting the Risk of Longevity.

The principal ways of meeting the risk of longevity are: (i) income from employment; (ii) income from investments (savings, securities and the like); (iii) governmental aid and insurance and (iv) pension planning. As Congress noted in its findings attendant to age discrimination legislation, employment opportunities for older citizens are, to be charitable, limited. Supra, n. 10. Investment income from savings and otherwise is, for most retired employees, insufficient even for a subsistence way of life. H. Denenberg, et al., supra n. 12 at p. 285. Governmental insurance is plainly insubstantial for most people, as the constant pressure on the Social Security system attests. Other governmental transfers would involve the social welfare systems of federal and state governments and would place an even greater burden on systems already operating at "peak load."

For working people, therefore, a form of insurance against longevity is a material help in enhancing their economic security. The manner in which the insurance industry, the actuarial profession and private and public employees have met the demand for insurance against longevity helps to explain the nature of the Title

VII violations which inhere in retirement plans based on single determinant longevity tables.

5. The Response to the Demand for Retirement Plans to Defer Income.

In the plans discussed here, the determination of benefits in a defined contribution plan and the determination of costs in a defined benefit plan are made by reference to mortality tables which differentiate solely by sex in assessing the risk of longevity. All factors associated with the risk of longevity - except sex - are knowingly excluded from consideration. We show here that the exclusion of all determinants but sex is out of step with the insurance industry's own standard practices in assessing risks to be insured against.

As TIAA-CREF and other amici curiae have stressed at great length, insurance against longevity is premised on groups exhibiting the same degree of risk. These industry representatives also stress that the fundamental baseline of risk classification (as a means of determining costs and benefits) is to group the insureds "on the basis of risk factors which are significant, statistically measurable and directly related to the expected risk of loss." Brief of

TIAA and CREF, p. 6. This view of risk classification is consistent with expert actuarial opinion which holds that ". . . the classes [of lives] entering the study should be similar in character and composition to the classes which will be assumed to be subject to the resulting rates" and that if "appreciable differences" in mortality "might materialize," it is sound actuarial practice to study the groups separately. H. Gershenson, supra n. 5 at p. 153.

While recognizing that appropriate grouping is an accepted means of risk classification, both the defendants and the insurance industry representatives fail to come to grips with the ultimate question of the selection of groups. For example, Gersheson holds that "characteristic mortality differences" are found among various regions of residence of prospective annuitants. Supra, n. 5 at p. 154. The same author, in noting that the interpretation of mortality statistics is "beset with many pitfalls", says that misleading conclusions may be drawn from a universe of insureds who are not segregated by locality and economic class. Id., at p. 171. On the question of selecting risk determinants, therefore, the proponents of sex-segregated longevity tables are content to ignore the expert opinion of their own

profession.

The proponents of single determinant tables also ignore such unambiguous factors bearing upon longevity as smoking, drinking and eating. A recent scholarly work has phrased the issue starkly:

> "Smokers die before non-smokers. Obese persons die before slender persons. Alcoholics die before teatotalers. These facts are not speculation. Insurance companies refuse to issue policies to such persons, or adjust the premiums, or exclude related risks from coverage. Yet retirement funds uniformly ignore use of alcohol, tobacco, and obesity. Instead, they choose the one characteristic which applies to women alone, longevity. Do they treat women differently only because of their longevity, or have they chosen longevity because it applies only to women?" M. Gold, Equality of Opportunity In Retirement Funds, 9 Loyola of L.A. L. Rev. 596, 625 (1976).

The relevance of personal habits can be as much a determinant of longevity as gender. For instance, it has recently been noted that smoking affects longevity at age 65 almost as much as gender. The life expectancy of a 65 year old male who has never

smoked exceeds that of a heavy smoker by nearly three and one-half years. U.S. Public Health Service, Health Consequences of Smoking (1968 Supp.) quoted in D. Halperin, Should Pension Benefits Depend on The Sex of The Recipient?, 63 AAUP Bull. 43, 45, n. 15 (1976).

Given the body of knowledge about longevity available to the proponents of sex-based mortality tables,[13] it is clear that the selection of sex from among all the determinants of longevity in constructing annuity mortality tables is irrational, arbitrary and inconsistent with normal insurance practices. This singling out of sex as a conclusively presumptive determinant of costs and benefits is inconsistent with the care with which the insurance industry purports to assess risks. Indeed, it is only when there is no further opportunity for learning about the risk involved that the insurance industry turns to pooling of risks as a means of spreading the risks among the widest group of persons

[13] E.g., Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J. Med. 863 (1977); Women in City Gov't United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Amended answers to requests for admissions, ¶10).

possible.[14] In the case of longevity -- a risk which we have demonstrated is a recent phenomenon -- the insurance industry simply has not followed its usual practice of studying the risk and determining costs and benefits by reference to all appreciable factors associated with longevity. Instead, it has singled out sex to the disadvantage of most females who do not possess the characteristic of a long life expectancy.[15]

[14] H. Denenberg, et al., supra n. 12 at pp. 9 et seq.

[15] Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975) (appeal pending); see generally, B. Bergmann and M. Gray, Equality in Retirement Benefits, Civil Rights Digest 25-27 (Fall 1975).

SUMMARY OF ARGUMENT

The measurement of employee benefits and costs by reference to mortality tables which differentiate only on the basis of sex is sex discrimination within the meaning of Title VII. Recent decisions of this Court require a finding of sex discrimination whenever men and women are treated differently with regard to insurance against the same risks. In this case, men are treated more favorably than women with respect to insurance against the risk of longevity because the benefits and costs of longevity insurance plans are determined on the basis of sex alone, despite a considerable body of knowledge concerning factors associated with life expectancy and despite the fact that sex is actuarially related to longevity only in a small portion of the population.

Section 703(a)(1) of Title VII literally prohibits disparate coverage against the risks of longevity on the basis of sex where such coverage is a part of compensation. Retirement plans discriminate on their face when they admittedly contemplate gender-based distinctions in benefits and costs. The plans also discriminate against women in effect by providing lower periodic benefits to women or by requiring women to make greater contributions than males in order to receive equal periodic benefits. In addition, these retirement plans on their face and by their history indicate

that the distinctions in benefits and costs based on gender are purposeful and intentional.

To the extent that the longevity of a small segment of the female population will require an increase in the cost of insuring females and males on the same basis, Title VII does not permit the imposition of the added costs upon all females and only females. In the absence of added employer contributions, it is both equitable and feasible to spread the marginal cost of insuring against the longevity of a small percentage of females among all employees in an employer's workforce.

ARGUMENT

RETIREMENT PLANS WHICH PROVIDE LOWER BENEFITS TO OR IMPOSE HIGHER COSTS UPON FEMALE EMPLOYEES BY REFERENCE TO MORTALITY TABLES WHICH SINGLE OUT SEX, AMONG ALL FACTORS ASSOCIATED WITH LONGEVITY, AS A CONCLUSIVE DETERMINANT OF BENEFITS AND COSTS VIOLATE §703(a) OF TITLE VII.

We direct our argument first, to the notion that use of sex-based tables is not sex discrimination within the meaning of §703(a); second, to the notion that Title VII permits some sex discrimination in retirement benefits and costs; and third, to the notion that the cost of providing equal risk coverage to women should be borne by women alone.

A. Longevity tables which single out sex, among all characteristics of longevity, as a conclusive determinant of costs and benefits discriminate because of sex.

The primary argument of proponents of sex-based longevity tables is that distinctions between males and females based

upon life expectancy are not distinctions on account of sex.[16] Neither prevailing authority nor the facts themselves support this argument for a special exemption from Title VII.

This Court has not, until the present case, addressed insurance cost and benefit differentials based solely upon sex. On two recent occasions, however, this Court has set forth the proper considerations in determining what distinctions are distinctions because of sex. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Court held that the exclusion of the risk of pregnancy from a disability insurance program is not gender-based discrimination. The Court looked to the selection of risks insured by the benefit program and found that males and females were accorded equivalent protection from the risks selected by the employer for insurance. The Court concluded that the employer's failure to include pregnancy among the insured risks does not constitute sex discrimination because the risk protection for the employees was equal between males and females. The Court reasoned:

> ". . . Gender-based discrimination does not result simply because an employer's disability benefits plan is less

[16] Brief of American Council of Life Insurance, p. 6.

than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed inclusion of risks." 429 U.S. at 138-140.

Retirement plans are on a wholly different footing. Here the employer agrees to insure males and females against the same risk (longevity) and there is no question of including "an additional risk, unique to women" in the retirement plan. 429 U.S. at 140. Gilbert, therefore, does not control this case nor does it stand for the proposition that actuarial distinctions are not distinctions based upon sex. Indeed, Gilbert strongly suggests affirmance of the case at bar on the ground that a clear gender line has been drawn here which forces women to pay more for insurance against the same risk (or, conversely, to suffer lesser coverage against the risk).[17]

[17] The Supreme Court, 1976 Term, 91 Harv. L. Rev. 1, 247-250 (1977).

More recently, the Court held that an employer's policy of denying accumulated seniority to females returning from pregnancy leave violates §703(a) because it burdens females in a manner which deprives them of employment opportunities because of their sex. Nashville Gas Company v. Satty, 46 U.S. L.W. 4026 (U.S. December 6, 1977). With respect to accumulated seniority, the Court emphasized the precise rationale of Gilbert that under §703(a)(1) an employer need not confer additional benefits upon women by insuring them against an additional risk. Instead, the Court found that the denial of accumulated seniority was a substantial burden imposed on women alone which deprived them of employment opportunities in violation of §703(a)(2). 46 U.S.L.W. at pp. 4027-28. With respect to the employer's policy of denying sick-leave pay to pregnant employees, the Court found Gilbert "legally indistinguishable" and remanded the case for consideration under §703(a)(1) of the theory that denial of sick leave pay in the circumstances was a pretext designed to discriminate because of sex.

The point of Gilbert and Satty for present purposes is that the Court has expressly refused to rule, as the insurance industry would have it do, that the presence of hypothetical equality in actuarial terms automatically

exempts retirement plans from Title VII coverage. Rather, the Court has suggested, both in Gilbert and Satty, that disparate coverage for each sex against the same risk constitutes discrimination because of sex.[18]

Just as the foregoing cases make clear that this Court has not ruled that longevity "can constitute a basis for differentiation between male and female

[18] General Electric Co. v. Gilbert, 429 U.S. at 138-40 (1976); Nashville Gas Company v. Satty, 46 U.S.L.W. at 4027-28 and 4030-31, n. 6. See also 91 Harv.L.Rev. supra n. 17 at 248 ("Women or minorities, in other words, will determine whether they are receiving equal benefits by comparing the extent to which they are protected against certain risks with the degree to which males or whites are protected against the same or analogous risks . . . Justice Rehnquist found that [the plan in Gilbert] avoided compensating one group for a risk while failing to provide equivalent compensation to the other for an analogous risk.")

employees, without constituting sex discrimination",[21] important facts concerning human longevity demonstrate that the Court should not so rule. Indeed, we note that not even TIAA-CREF, a vigorous proponent of sexually dual mortality tables, appears to take the extreme position that distinctions in longevity, when computed without reference to any known characteristic of longevity except sex, can never constitute discrimination because of sex.[22]

[21] Brief for American Council of Life Insurance, pp. 6-7.

[22] TIAA-CREF simply argues that Title VII permits the recognition of male-female longevity differences in computing costs and benefits of retirement plans. That argument, while less extreme than the position of the American Council of Life Insurance, still fails to come to grips with the importance of the discriminatory selection of characteristics in constructing the longevity tables.

What makes distinctions based on longevity distinctions because of sex in the context of the retirement plans in issue is the selection of sex as the exclusive determinant of the costs and benefits of risk coverage. When using any device to compute the costs and benefits of deferred compensation retirement plans, employers are obliged to treat males and females, blacks and whites and other protected and non-protected groups alike. Where there is a substantial body of knowledge available concerning human longevity, it cannot be said that the selection of sex as the exclusive means of determining costs and benefits of retirement plans is not discriminatory because of sex. Indeed, in order for the tables to distinguish on account of longevity alone, all of the measurable and appreciable determinants of longevity would have to be factored into the tables. The exclusion of all characteristics of longevity other than sex, and the inclusion of sex alone, demonstrates that the mortality tables at issue distinguish on account of sex and not on account of longevity.

The factors other than sex which determine human longevity, and which can be and have been measured with a significant degree of accuracy, were brought to the attention of the court below in this case and resulted in the following

unassailable logic:

> "How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words." 553 F.2d 581, 593 (1976).

Lest there be any doubt that factors other than sex determine human longevity, one need only refer to evidence taken from proponents of sex-based tables themselves: "Human longevity, mortality and life expectancy show a statistical correlation to socio-economic status, occupation, medical history, marital status, heredity and status as a smoker or non-smoker." Women In City Government United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Defendants' amended answers to requests for admissions, ¶10). Even in this case, the American Council of Life Insurance has told this Court that social habits and environmental

factors are "relevant in predicting [an] applicant's life expectancy" and that using those factors would "refine" the prediction of life expectancy without converting it into a certainty.[23] This concession about the relevance of "social habits" and "environmental factors" is significant, for it indicates that sex has been selected as the conclusive determinant either arbitrarily or merely for reasons of administrative convenience and economy.[24] The universal agreement that numerous factors influence longevity is, quite simply, pregnant with the ultimate conclusion that tables which use only sex to determine longevity are tables which distinguish on the basis of sex in their results.

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[23] Brief of American Council of Life Insurance, p. 18 at n. 36.

[24] The admission by industry representatives that numerous factors influence longevity need not end the inquiry into this matter. There is available to this Court, as there has been available to the insurance industry itself, a detailed body of knowledge concerning human life expectancy and its determinants. Secondary sources of information are collected in Note, Sex Discrimination and Sex-Based Mortality Tables, 53 Boston U.L.Rev. 624, 626-628, nn. 12-20 and text (1973); see also "Longevity in Hawaii is Nation's Longest," The New York Times, p. A22 (Dec. 15, 1977).

Recent changes in the relative importance among characteristics of human longevity must also be taken into account. For example, present actuarial data limited to considerations of sex are, most probably, inaccurate because of the changing work and life patterns of our society. The increase of women in high stress jobs renders suspect the actuarial prediction that women as a class will live longer than men as a class in a discrimination-free employment environment. See Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J.Med. 863 (1977). See also Note, 53 Bost. U.L.Rev., supra at n. 2 (1973). A broad ruling by this Court exempting from Title VII retirement plans which differentiate on the basis of sex would be inconsistent with the mandate of Title VII to provide women with an equal opportunity to enjoy the benefits of the more attractive job positions in our nation's workforce.

In deciding whether distinctions based on present mortality tables are distinctions because of sex the Court should also take a close look at the relationship between sex and longevity.

The relationship between sex and longevity has been vastly overstated by proponents of sex-based longevity tables. The work of Professors Bergmann and Gray shows that there is little relationship between sex and longevity with respect to the

overwhelming majority of men and women.[25] This is because a considerable overlap exists in the ages at which men and women actually die. In a group of 1,000 men age 65 and 1,000 women age 65, for instance, the studies of Professors Bergmann and Gray show that 84% of the men and women share the same age at the dates of their deaths. Only 16% of the group cannot match death ages. Thus, there are approximately 8% who are men who die relatively early unmatched by women's early deaths and 8% who are women who die relatively late whose deaths are unmatched by men. In short, the relationship between sex and longevity is significant only to a small proportion of these hypothetical males and females. Notwithstanding this fact, the actuarial tables attribute the characteristic of greater longevity to all women while attributing the characteristic of lesser longevity to all men. As we show later, it violates Title VII to require all women - and women alone - to assume the cost burden which the late deaths of a small percentage of women appear to require. For present purposes, however, we submit that the relationship between sex and longevity -- as it applies to each and every male and female -- is not so indisputable as to require a holding

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[25] Supra, n. 17.

that longevity tables based on sex do not constitute sex discrimination.

Recent mortality data used by TIAA-CREF shows that female life expectancy at age 65 is increasing at a lesser rate than male life expectancy at age 65. The A-1949 table which was used in modified form by TIAA until March of this year shows that the male life expectancy at age 65 was 15.01 years and female life expectancy at age 65 was 17.94 years. The 71-IAM table which TIAA has used in modified form since March of this year shows that in more recent times male life expectancy at age 65 was 17.17 years and female life expectancy at age 65 was 20.10 years. Not only does this data show that the female rate of increase in expectancy is less than the male rate of increase, but also future data may be affected by the recent and continuing expanded employment opportunities for females under Title VII.

The point we emphasize about all of this data and about the selection of sex, among all factors associated with longevity, as a determinant of costs and benefits, is that "conscious choice is involved in both the collection and the use of statistical data for the preparation of annuity programs." Interim Report on Equal Periodic Pension Benefits for Men and Women, 62 AAUP Bull. 339 (Autumn 1976). It is our view that the insurance industry made a conscious choice in responding to the increased

demand for pension programs not to use data concerning factors other than sex which appreciably affect longevity. In constructing tables to determine the costs and benefits of these retirement programs, the industry has conclusively relied upon sex alone, of all longevity characteristics. In view of the sole reliance on sex in determining benefits and costs, the body of knowledge concerning other factors associated with longevity, the evidence that sex and longevity are linked, if at all, only in a small segment of the population, and this Court's indication in Gilbert and Satty that disparate treatment in coverage of the same risk is sex discrimination, we submit that the mortality tables at issue do discriminate because of sex.

B. Title VII proscribes the use of sex, among all factors associated with longevity, as a conclusive determinant of the benefits and costs of retirement plans.

Section 703(a) of Title VII provides:

> (a) It shall be unlawful employment practice for an employer -
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> (1) To fail or refuse to hire or to discharge any individual, or otherwise to

> discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. §2000e-2(a)(1).

The statute, on its face, admits of no exception for retirement plans, and literally proscribes all discrimination in "compensation" under §703(a)(1).[26] Strict construction of this statute requires a ruling that where an employer decides to insure its employees against the risk of longevity, both the benefits and the costs of that insurance must be on a parity as between males and females. In both the plan at bar and the TIAA-CREF plan, the failure to provide each and every female employee with risk coverage equivalent to her male counterpart is a clear and unequivocal discrimination against individuals with respect to compensation, terms, conditions and privileges of employment in violation of §703(a)(1).

[26] This brief does not treat §703(a)(2) since a ruling under that section is not necessary to the decision of this case. That the retirement benefits amount to "compensation" has been amply demonstrated, infra, pp. 7-11, and there is no occasion to elaborate on that proposition. Supra, n. 9.

Going beyond the face of the statute, however, may be necessary in light of this Court's recent Title VII analysis of employee benefit plans. Gilbert and Satty suggest that retirement plans first be evaluated on their face to determine whether they contemplate gender-based discrimination. As demonstrated before, the selection of sex as the exclusive determinant of costs and benefits, in the circumstances here, amounts to discrimination because of sex and therefore renders retirement plans based upon such tables discriminatory on their face. The court below faithfully followed this mode of analysis in holding that "when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids." 553 F.2d at 591. We believe that the Court should affirm that holding.

This Court has also held that a violation of §703(a) can be proved by evidence of discriminatory effect. Nashville Gas Company v. Satty, supra; Griggs v. Duke Power Company, 401 U.S. 431 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The discriminatory effects in this case are plain. Under these sex-based retirement plans, women either receive lower benefits for the same dollar contributions or they are required to contribute more to the plan as a means of achieving equivalent benefits. In no case under these plans is there any parity of benefits accruing to men and women alike as a result

of the employer's insurance against the risk of longevity. This discriminatory effect is highlighted by the fact that the overwhelming majority (84%) of male and female employees die at the same time; yet the use of sex as a conclusive determinant of costs and benefits either lowers every woman's benefits or raises every woman's cost of securing equal benefits. See Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). In short, the attribute of long life expectancy which is shared by a small percentage of females becomes a fulcrum for burdening all females but no males. The impact on females is not just disproportionate - it is exclusive. Thus, the discriminatory effect of these plans is clear.

The ultimate impact which these sex-based retirement plans are beginning to make and will increasingly make upon our nation's retired citizens should not be overlooked. Those retirees who are female and whose retirement benefits are measured by discriminatory actuarial standards are and will be relegated to lower deferred compensation and an inferior style of life in their later years. To condone the use of sex-based longevity tables on the slender rationale offered by their proponents is to single out by sex a huge group of females and thereby commit them to second class retirement.

The discriminatory effect of these deferred compensation plans is apparent in other ways. First, where the utility

of male and female employees (those in the same jobs with the same length of service) is presumed to be equal, it is discriminatory to require females to suffer lower benefits or higher cost for equal benefits. The wage-productivity equation is effectively nullified by retirement plans in which sex is the exclusive determinant of benefits and costs. This has prompted one commentator to ask whether the guaranty of equal employment opportunities is "so fragile that a woman may now aspire to jobs which in the past were closed to her, but only if she will accept a lesser degree of remuneration?"[28]

Second, the discriminatory effect is most apparent in that vast majority of male and female counterparts who share the same actuarial death ages. For those persons - who comprise most of the workforce - only one's sexual identity alone determines the value of one's coverage against the risk of longevity. Thus, the great majority of men and women who share the same death age will also share this common disparity in the value of their insurance against longevity: each man will have paid less money in contributions or will have received more money in benefits than each woman.

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[28] M. Gold, supra, 9 Loyola of L.A.L.Rev. at p. 618.

Finally, to the extent that an intent to discriminate is pertinent to the finding of an unlawful employment practice under §703(a),[29] intent may be inferred from the face of these plans which do not even pretend not to differentiate on the basis of sex. In any event, there is also clear and unmistakable circumstantial evidence that retirement plans which refer to actuarial tables determined solely by sex plainly are intended to discriminate against women within the meaning of prevailing authority. See generally, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); cf. Washington v. Davis, 426 U.S. 229 (1976). The requisite showing of intent can be made without proving that the challenged decision was motivated solely by a discriminatory purpose or that the purpose was even a dominant or primary one. The standard is that where a discriminatory purpose has been a "motivating factor" in the decisional process, a finding of invidious discriminatory purpose may be made. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at ___. In any event, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. 429 U.S. at ___.

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[29] See Nashville Gas Company v. Satty, 46 U.S.L.W. at 2048.

In the case of sex-based retirement benefits and costs, a fair application of the factors enumerated in Arlington Heights requires the conclusion that the sex discrimination here is purposeful and intentional. As stated above, the discriminatory effect of using sex-based mortality tables is substantial and unambiguous. Likewise, the historical background reveals a purpose to isolate sex as the exclusive determinant of costs and benefits. From the considerable background material which we set forth on pages 5 through 17, one can fairly infer that the providers of insurance against the risk of longevity genuinely intended the inevitable consequences of excluding all considerations of longevity other than sex. Moreover, the same material shows that the insurance industry substantially departed from its ordinary standards of study and classification when it decided to exclude all determinants other than sex from the longevity tables. Finally, the frank admissions, in testimony and otherwise, of insurance industry officials supports the view that the offerors of longevity insurance understand fully that the decision to exclude all longevity factors other than sex is a cost saving device which sacrifices sound insurance principles and contravenes wise public policy.

Where the statutory language is unambiguous and the discrimination is so clear, both on its face and in effect, the Court should not hesitate finding that §703(a)(1) proscribes the conduct at issue here.

C. Title VII proscribes any requirement that all female employees - and females alone - pay the costs of providing to females the same protection which males receive against the risk of longevity.

The proponents of sex-based mortality tables point out that if they are forced to comply with Title VII and equalize male and female retirement benefits, there will be a cost to be absorbed. To the extent that such a cost materializes, the question is whether that cost is to be paid by all female employees because of their sex or whether the cost is to be spread equitably among all employees like all elements of overhead which an employer must incur by having female employees.[30]

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[30] Employers do not in practice hire two separate sets of employees and allocate overhead between the sexes of their employees. It defies both notions of elemental fairness as well as the plain

Spreading the modest incremental cost of longevity shared by a small percentage of females over the widest group possible is certainly consistent with the mandate of Title VII and the cases construing it.[31] For example, the court below properly noted that Title VII requires treatment of each employee as an individual and not as a member of a particular sex, race or other protected group. 553 F.2d at 590-91. Accordingly, the court below did not find persuasive the argument advanced in this Court that the costs of insuring against female

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30 Cont'd
requirements of Title VII to require only women, because of their sex, to shoulder the burden of female longevity especially when most women do not even exhibit that characteristic.

31 Manhart v. City of Los Angeles, 553 F.2d 581 (9th Cir. 1976); Henderson v. Oregon, 405 F.Supp. 1271 (D.Ore. 1975); cf. Reilly v. Robertson, ___ Ind. ___, 13 EPD ¶1126 (1977).

longevity should be borne by all females, but not by any male.[32]

The principle that Title VII prohibits employers' requiring females to bear a disproportionate share of the cost of insuring against longevity is not inconsistent with modern industrial practices. Indeed, we understand from the amici who support sex-based mortality tables that private industrial pension plans ordinarily pay employees a fixed percentage of their salaries, regardless of sex. When there are incremental costs in providing these benefits to the relatively small number of long lived females, the employers are shouldering the cost as an element of their overhead. In any event, they are certainly not assessing their female employees for the cost of insuring that small percentage which lives past a normal life expectancy. Yet, in the face of this practice, this Court is being told that equal benefits are virtually impossible. In truth, equal benefits can be provided to all employees, male and female alike. Title VII simply requires that the cost of providing these equal benefits be shared by all employees, male and female alike.

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32 The construction of Title VII which prohibits an employer from requiring females to be responsible for various portions of overhead useful to a small percentage of females is also consistent with EEOC

In seeking a special exemption from the requirements of Title VII, the proponents of sex-based mortality tables raise several arguments against spreading the cost of insuring against the risk of longevity. These arguments, for the most part, constitute attempts to justify present practices on the grounds of "business necessity" within the meaning of Griggs v. Duke Power Company, supra. See also Nashville Gas Company v. Satty, 46 U.S.L.W. at 4028, n. 5 and text. The general rule is that if an employer's business necessitates the adoption of particular compensation or other employment policies which have the effect of discriminating, Title VII may not prohibit the adoption of these policies. Griggs requires that the touchstone of an exemption from Title VII be "business necessity", and the burden of producing clear and compelling proof of such necessity is on the party seeking to justify the discriminatory policy. And, it must be emphasized that the burden is not met by a simple showing that it costs money for an employer to provide the equal treatment to its employees. E.g., Robinson v. Lorillard Corp., 444 F.2d 791, 799 n. 8, 800 (4th Cir.), cert. denied, 404 U.S. 1006 (1971). Indeed, in Taylor v. Goodyear

32 Cont'd
regulations and rulings. See 29 C.F.R. §1604.9(f); EEOC Dec. No. 75-146 (Jan. 13, 1975).

Tire & Rubber Co., 6 FEP Cases 50 (M.D. Ala. 1972), an employer argued that the costs of sickness and accident benefits for male and female employees were not equal and that the difference in the amount of benefits was justified by the difference in the costs of providing these benefits. The district court reasoned:

> "It was established that the cost of providing sickness and accident benefits for the female employees at this plant was higher than the cost of providing such benefits for the male employees. It was also established that the percentage of the difference in the cost of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female

employees cannot be regarded as proof that the cost of providing these benefits for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC guidelines provide in unequivocal terms that 'it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the costs of such benefits is greater with respect to one sex than the other'. The differential in the amount of benefits was unlawful under Title VII and the plaintiffs are entitled to relief." 6 FEP Cases at 57-58.

The proponents of the sex-based mortality tables make some attempt beyond costs to justify current practices by arguing as follows: (i) that tables not based on sex are not feasible; (ii) that there will be a material adverse effect upon the stability of present retirement programs and (iii) that competing social policies require an exemption for retirement plans from Title VII. These arguments are insubstantial for the following reasons.

First, retirement plans can be based upon tables not using sex as the prime determinant and, in fact, many such plans are now in effect. For instance, Jonathan Schwartz, the chief actuary of the five actuarially funded retirement systems of the City of New York, testified in a deposition last year that "it is not uncommon to have plans in private industry where the rate of contribution is a fixed percent of salary regardless of sex" and where all employees receive the same retirement benefit regardless of sex.[33] Costs and benefits of many federal and state retirement plans are also computed without regard to sex and, despite other funding problems, there is no evidence to show that the absence of sex as a prime determinant of costs and benefits has materially adversely affected these

[33] Women in City Government United v. The City of New York, No. 75 Civ. 2868 (S.D.N.Y.) (Deposition of Jonathan Schwartz, p. 68).

plans.[35] Since it is clear that a mortality table excluding sex (or even one including sex as one among a considerable number of other determinants of longevity) can be constructed, it is certainly no objection to changing the status quo that difficult problems may be encountered. The only problem pointed out to this Court so far as we have seen is the modest increase in the cost of providing equal insurance benefits against the risk of longevity.[36] If this incidental

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[35] TIAA-CREF has stipulated in Spirt v. TIAA, No. 74 Civ. 1674 (S.D.N.Y.) that "it would be technically possible to construct a mortality table which would combine mortality statistics relating to both males and females . . . [and] such a table, however, would necessarily reflect the male-female composition, or ratio, of the group of persons to which it related." Stipulation of Facts ¶32. In fairness, TIAA further stipulated that the parties differed as to the necessity, fairness, validity and propriety of such a mortality table under applicable law. Id.

[36] Considerations of administrative case, which are not entitled to much weight, have been hinted at, but do not rise to the level of oppression necessary to sustain a business necessity "defense". Brief of American Council of Life Insurance at p. 18, n. 36.

cost does materialize,[37] and if the employer decides to equalize benefits by increasing female benefits, rather than by reducing male benefits, Title VII clearly requires that all employees bear a proportionate share of paying these increased costs, if the employer is not otherwise required to do so. In no event, however, does Title VII permit the employer to impose the incremental cost upon every individual female and exempt every individual male from sharing it. Indeed, it would likely be counterproductive for employers to do so since employers maximize profits by attracting and keeping productive employees, making retirement prospects bright, maintaining good employee morale and achieving a non-discriminatory workforce. Business necessity, therefore, tilts in favor of doing everything possible to equalize coverage of the risk of longevity for males and females.

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[37] An increase in cost is not certain since more refined tables may be used to select out some risks and thereby lower some costs. Moreover, the increase will not likely be any faster than the progress women make into the workforce by virtue of Title VII's mandate.

Second, the proponents of sex-based mortality tables say that retirement systems will become unstable unless sex continues as the prime determinant of costs and benefits. They point again to the increased cost of providing equal benefits to females, but we have shown that this cost, if not assumed by the employer, can be paid for equitably by all of the beneficiaries, male and female alike. Moreover, the cost of funding can possibly be reduced by more careful study and pooling of annuitants. Providers of annuities can determine in advance mainly by written applications those persons who possess a high risk of longevity and those who do not. By means of this kind of refinement, which is common to all forms of insurance, the cost of providing benefits may be adjusted in accordance with the risks revealed. Additionally, there is no material evidence to suggest that retirement plans not using discriminatory tables are, in fact, bankrupting themselves <u>because of the absence of sex as the determinant</u> of their costs.

Promoters of sex-determined retirement benefits also assert that mostly male employers would, by market pressure, leave existing plans and go to companies which insure only groups which are almost exclusively male. With respect to teaching institutions this is highly unlikely since TIAA-CREF occupies such an important position in the retirement plan business that the prospect of short term low rates

would not likely cause a significant market shift. Moreover, offerors of insurance plans could not properly cater solely to single-sex groups. Also, the ultimate impact of Title VII in the labor force will eventually result in a more fully sexually integrated pool of prospective annuitants. This, too, will reduce market pressure to shift carriers.

Finally, the proponents of sex-determined costs and benefits fall back upon what they consider to be wise public policy in arguing for an exemption from Title VII: "Although social arguments have their place . . . they do not work well in the private sector."[38] The argument continues that if this matter is to be decided as a contest of competing value judgments, the Court should consider that "mandation of how to classify or rate policies . . . could cause elimination of the private insurance market with the necessity of a take-over by the government -- a trend which is just the opposite of what the public and the President, appear to want." B. Lautzenheiser, "Sex And The Single Table Revisited," <u>Actuary</u> No. 7 at p. 1

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[38] B. Lautzenheiser, <u>Sex and The Single Table: Equal Monthly Retirement Income For The Sexes?</u> Employment Benefits Journal (Fall 1976).

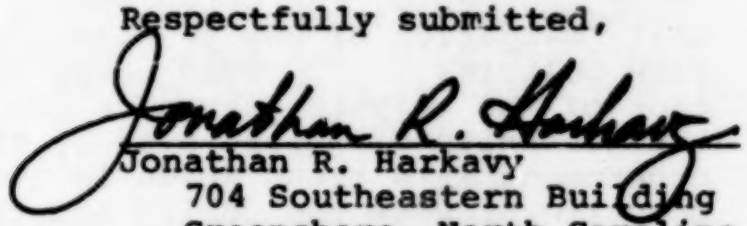
(September, 1977). This kind of scare tactic is hardly worthy of mention, except to say that if the matter is considered to be one of competing value judgments, we believe that Congress has made that judgment by requiring an end to employment discrimination of all kinds and a change in the patterns of business practices to accomodate the worthy public policy underlying Title VII.

CONCLUSION

For all of the foregoing reasons, ANA respectfully submits that the decision of the Court below should be affirmed.

This 20th day of December, 1977.

Respectfully submitted,



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